day, whether such promise be express or implied, and treats the Sunday acts as mere preliminary negotiations. The one difficulty that the theory of ratification, like that of implied assumpsit, presents, is that of past consideration. This may perhaps be avoided by saying that the passing of title furnished the consideration, and that this did not happen until the time of the subsequent ratification, since all the acts done on Sunday were void. But unless the subsequent ratification be express, it is difficult in most cases to find any one point of time when it can be said that title did pass.

Whatever course of reasoning may be adopted to avoid the harshness of the application of Sunday laws to unilateral contracts, the most logical course for the courts to pursue where both parties have fully performed, is to adopt a *laissez faire* policy, refusing to assist either party to obtain a rescission. Nor does it appear that such a policy will fail to do justice in the majority of cases. In the recent case of *Wilson* v. *Calhoun* (Iowa 1915) 151 N. W. 1087, it is stated that where a deed is fully executed and delivered and the purchase price paid on Sunday, neither party may rescind and recover back his consideration on the ground that the transaction took place on Sunday. This attitude of the court is sound in theory and is fully supported by authority. It is one thing to hold that a court will not lend its aid to enforcing a contract made on Sunday; it is quite a different thing to say that the court will aid the participant in such a transaction to repudiate his acts and place himself in *statu quo* merely because he has made a bad bargain, and this the court properly refused to do.

ACTIONS FOR WRONGFUL DEATH.—At common law there was no recovery where death resulted from injury to the person.[1] To remedy this defect, various statutes giving actions in specific cases have been passed, the earliest being in Massachusetts in 1668.[2] In 1846, in England, there was enacted a statute entitled "An Act for Compensating the Families of Persons Killed by Accident",[3] better known as Lord Campbell's Act. In substance this act gave a right of action for wrongful death, to the personal representative for the benefit of the family of the deceased, wherever the decedent would have been able to maintain one, had he lived. Starting with New York in 1847, practically all of the states of the United States have copied the English act, frequently incorporating its provisions into their laws almost verbatim.[4] Side by side with these statutes, have been enacted others giving a right of survival to personal actions which had been or could have been begun by the person injured, prior to his decease.[5]

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avoiding the note. Hale *v.* Harris (Ky. 1906) 91 S. W. 660. A few courts, while accepting the theory of ratification, nevertheless maintain that such ratification must be in express terms. Reeves *v.* Butcher (1865) 31 N. J. L. 224; *contra,* Adams *v.* Gay (1847) 19 Vt. 358; Planters Fire Ins. Co. *v.* Ford (1913) 106 Ark. 568.

[1]Higgins *v.* Butcher (1606) Yelv. 89; Baker *v.* Bolton (1808) 1 Camp. 493.

[2]Tiffany, Death by Wrongful Act (2nd ed.) § 4 n. 5.

[3]9 and 10 Vict., c. 93; Tiffany, Death by Wrongful Act (2nd ed.) §§ 20, 21.

[4]Tiffany, Death by Wrongful Act (2nd ed.) § 19.

[5]Tiffany, Death by Wrongful Act (2nd ed.) § 26; see note in 8 L. R. A. [N. S.] 384.

In construing these two classes of statutes, there is a wide diversity of opinion, both in deciding what defences are available, and also in determining whether a recovery under one statute is a bar to a recovery under the other.

The survival statutes merely continue the old cause of action which the decedent himself had.[6] This action is given to recover damages for the pain, cost of medical attendance, etc. of the deceased, and the damages thus collected become assets of the estate.[7] Consequently any defense that would be open against the decedent had he prosecuted the action, is open against the administrator.

The acts copied from Lord Campbell's act, according to the great weight of authority, create an entirely new cause of action,[8] although there are a few jurisdictions where the courts have reached an opposite conclusion.[9] The prevailing view, which seems to be the better one on principle, is supported on the ground that the basis for the action, as evidenced by the wording of the statute, is the damage suffered by the dependents of the deceased by reason of his death, and not the suffering endured by the deceased himself. Wherever this reasoning is law, it logically follows that damages may be recovered solely for the death and not for the suffering of the deceased;[10] that the contributory negligence of the beneficiaries may be pleaded in bar;[11] and that the Statute of Limitations shall run only from the time of the death complained of.[12] Likewise, under this interpretation, it becomes clear that it is immaterial whether there has also been a recovery under the survival statute.[13] It is only in those jurisdictions where statutes for wrongful death are considered as not giving a new cause of action, that a recovery under a survival statute acts as a bar.[14]

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[6]Lehmann *v.* Farwell (1897) 95 Wis. 185; Norton *v.* Sewall (1870) 106 Mass. 143.

[7]Brown *v.* Chic. & N. W. R. R. (1899) 102 Wis. 137, 142. In State *v.* Maine Cent. R. R. (1872) 60 Me. 490, it was held that the survival statute applies solely where death is not instantaneous; and the death act applies only where death is instantaneous.

[8]Pym *v.* Gt. Nor. R. R. (1863) 4 Best & S. 396; Stewart *v.* United Elec. Lt. & P. Co. (1906) 104 Md. 332; Burdick, Torts, (2nd ed.) 233; Tiffany, Death by Wrongful Act (2nd ed.) § 23. As it creates an entirely new cause of action it was held in Safford *v.* Drew (N. Y. 1854) 3 Duer. 627, that it must affirmatively appear that those beneficiaries that can take under the statute are living.

[9]Strottman *v.* St. Louis I. M. & So. R. R. (1908) 211 Mo. 227; Proctor *v.* Hann & St. Joe. R. R. (1876) 64 Mo. 112; see Cooley, Torts, (3rd ed.) 549, 550.

[10]Blake *v.* Midland R. R. (1852) 10 Eng. Law & Eq. 437; see Pym *v.* Gt. Nor. R. R., *supra.*

[11]Williams *v.* T. & P. R. R. (1883) 60 Tex. 205; see Del Rossi *v.* Cooney (1904) 208 Pa. 233. In Chic. City R. R. *v.* Wilcox (1891) 138 Ill. 370, it was held that the negligence of the parent will not be imputed to the infant child.

[12]14 Columbia Law Rev., 609.

[13]Davis *v.* R. R. (1890) 53 Ark. 117; Bowes *v.* Boston (1892) 155 Mass. 344; Hurst *v.* Detroit City R. R. (1891) 84 Mich. 539; Mahoning Valley R. R. *v.* Van Alstine (1908) 77 Oh. St. 395.

[14]Hulbert *v.* City of Topeka (C. C. 1888) 34 Fed. 510; Legg *v.* Britton (1890) 64 Vt. 652, apparently overruling the earlier decision of Needham *v.* Grand Trunk R. R. (1865) 38 Vt. 294, which allowed the two actions.

But even where it is settled that the statutes for wrongful death create a new cause of action, a difficulty arises where the deceased by settlement has, without fraud or duress, released all claims against the wrongdoer. This is due to the particular wording of Lord Campbell's Act which has been widely copied. As already stated, it provides in effect that an action can be maintained only in cases where the deceased could have maintained one. By settlement, then, the deceased has debarred himself from the right to sue, and so the personal representative is concluded by the very words of the act.[15] Other reasons advanced under the same circumstances are, that the one who sues merely steps into the decedent's shoes;[16] and that the legislature never intended to impose a double liability.[17] The recent case of *Rowe* v. *Richards* (S. D. 1915) 151 N. W. 1001, represents a different holding. Here the court held that since the act created a new cause of action a settlement by the deceased is no bar. This would undoubtedly be correct were it not for the very words of the statute providing that the action can only be maintained where the deceased could have maintained it. Consequently, however desirable the result in the principal case may be, the decision is open to the charge of bringing about by judicial determination that which clearly lies within the province of the legislature.

[15]Dibble *v.* N. Y. & Erie R. R. (N. Y. 1857) 25 Barb. 183; Read *v.* Gt. East. R. R. (1868) L. R. 3 Q. B. 555; Price *v.* R. R. (1890) 33 S. C. 556. The same reasoning has been applied in the case of a recovery, Littlewood *v.* Mayor, etc., of N. Y. (1882) 89 N. Y. 24; and also where the deceased has been guilty of contributory negligence. Malloy *v.* Amer. Hide & Leather Co. (C. C. 1906) 148 Fed. 482. It is to be noted, however, that where the decedent has been guilty of contributory negligence there is, in legal contemplation, no death due to the wrongful act of another.

[16]Hill *v.* Pa. R. R. (1896) 178 Pa. 223.

[17]Littlewood *v.* Mayor, etc., of N. Y., *supra*; So. Bell Tel. Co. *v.* Cassin (1900) 111 Ga. 575. The latter case was decided under a Georgia statute where the words "such as the decedent might have maintained," are wanting.